STATE OF MICHIGAN

COURT OF APPEALS

BECKY L. GLESNER TRUST,

Plaintiff,

v

THREE OAKS PROPERTY FUND, LLC, WILLIAM J., GODFREY, JOHN ZDANOWSKI TERESA WELSH, and THREE OAKS GROUP, LLC,

Defendants,

and

JANETTE FERRANTINO,

Intervening Plaintiff-Appellant,

v

BECKY L. GLESNER TRUST,

Defendant-Appellee,

and

THREE OAKS PROPERTY FUND, LLC,

Defendant,

and

JOHN ZDANOWSKI,

Intervening Plaintiff,

v

BECKY L. GLESNER TRUST and THREE OAKS PROPERTY FUND, LLC,

Defendants.

UNPUBLISHED
October 23, 2014

No. 316512
Washtenaw Circuit Court
LC No. 12-001029

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Intervening plaintiff, Janette Ferrantino, appeals as of right the circuit court's April 26, 2013 opinion and order dismissing her claim to determine whether her security interest in certain proceeds had priority over the competing claim of the original plaintiff in this action, Becky L. Glesner Trust (the "Trust"). The proceeds at issue originate from the sale of a building by a subsidiary of defendant Three Oaks Property Fund, LLC ("TOPF"). Ferrantino maintains that her perfected security interest is superior to the Trust's claim, which derives from a judgment confirming an arbitration award in its favor against TOPF. The Trust counters that TOPF's operating agreement barred Ferrantino's security interest *ab initio* and that the Trust's claim to the proceeds therefore remains unaffected by Ferrantino's intervention. For the reasons set forth below, we reverse and remand for proceedings consistent with this opinion, including resolution of the issues of the validity and priority of Ferrantino's security interest as raised by the parties in their cross motions for summary disposition and, if necessary, for a determination as to whether Ferrantino is entitled to a distribution of the sale proceeds if there was an event of default.

I. BACKGROUND

This case is about who is entitled to the proceeds from the sale of the historic Trust Building in Grand Rapids. It arises out of a dispute among real estate investors concerning the management of TOPF and certain loans made to a subsidiary of that entity.

TOPF is a real estate investment company that operates a number of subsidiaries through which it buys and sells residential and commercial income properties. TOPF is managed by defendant Three Oaks Group, LLC, which is in turn managed by defendants William Godfrey, John Zdanowski and Theresa Welsh. Governing TOPF is an operating agreement, which, among other things, permits its manager to grant security interests in real or personal property, while simultaneously prohibiting the manager from transferring substantially all of TOPF's assets absent "approval by a Majority in Interest." Notably, TOPF's assets consist almost exclusively of its membership interests in its subsidiaries since TOPF, itself, has no property or significant cash holdings.

In late 2008, a subsidiary of TOPF, Terraces on Main, LLC ("Terraces"), took out a loan with Comerica Bank in conjunction with a residential property development project in Ann Arbor. Ferrantino, then a member of TOPF, guaranteed the initial $750,000 loan, which was eventually increased to a total of $1.6 million. As security for the guaranty, Terraces' parent, TOPF, pledged membership interests in all of its subsidiaries, with the exception of Terraces. One of these interests was in Pearl Oaks, LLC, which at the time owned the Trust Building. Ferrantino perfected her security interest on December 3, 2008.

By early 2010, TOPF needed an infusion of funds and, consequently, issued a capital call. Among TOPF's members requested to contribute was the Trust, over which Becky Glesner as the trustee had full control. Glesner testified that at a June 2010 meeting, she learned that TOPF had pledged certain properties as collateral for a loan from Zdanowski[1] as well as for a loan guaranty made by another member whom Glenser later discovered to be Ferrantino. It is undisputed that a majority in interest in TOPF did not approve the pledges to Ferrantino or Zdanowski.

Dissatisfied with the lack of detail regarding the scope of TOPF's pledges, Glesner sought more information whereupon she learned that TOPF had pledged membership interests in all of its subsidiaries. According to Glesner, the result of this pledge was that in the event of default and foreclosure on the security, Ferrantino would control the distributions from TOPF. After Glesner's repeated efforts to obtain further information proved unsuccessful and TOPF elected to proceed with the capital call, Glesner commenced arbitration proceedings through the Trust to protect her investment.

II. PROCEEDINGS

The arbitration commenced in January 2011 in accordance with TOPF's operating agreement. The statement of claim, as amended, alleged among other things that defendants had engaged in self-dealing and had "violated the operating agreement by pledging all of the assets of TOPF to Janette Ferrantino and John Zdanowski without prior approval from or notice to the members." Also included were specific counts for: fraudulent misrepresentation, promissory estoppel, breach of the operating agreement, violations of the Limited Liability Company Act, MCL 450.4101 *et seq*., and declaratory relief. Ferrantino was not named as a defendant in the statement of claim. Following a hearing, the arbitrator—without explanation—entered an award against TOPF in the amount of $186,220 (plus interest and costs). Paragraph 5 of the award expressly indicates it is "in full settlement of all claims submitted to this Arbitration."

The Trust then brought an action in circuit court to confirm this award, and a final judgment confirming the arbitration was entered on December 5, 2012. Having received no payment from TOPF after two days, the Trust sought to enjoin TOPF from transferring any assets that could jeopardize its collection on the award. On December 12, 2012, the court entered an order enjoining TOPF from transferring any assets, with the exception of the Trust Building in Grand Rapids (then owned by its subsidiary Pearl Oaks) on condition that the parties consent to the transfer and that "the proceeds of that sale are deposited into an escrow account with this Court." The Trust Building was sold shortly thereafter for approximately $209,500 and the proceeds were deposited into escrow.

Upon learning of the sale and the Trust's claim in the proceeds, Ferrantino moved to intervene in January 2013. She alleged that her perfected security interest in these proceeds was superior to the Trust's claim in them. The court permitted her intervention, and Ferrantino

[1] Zdanwoski loaned TOPF approximately $450,000 in 2010. It is undisputed that any security interest Zdanowski holds for these loans is subordinate to Ferrantino's claimed interest.

sought a declaration that her security interest had priority over the Trust's judgment. Ferrantino additionally requested an escrow distribution sufficient to cover a portion of her obligations as guarantor of Terraces's loan.[2]

The parties subsequently filed cross motions for summary disposition. Ferrantino asserted her security interest was first in priority. The Trust claimed that Ferrantino's security interest was granted in violation of the operating agreement and that her claim was otherwise not ripe because payment was not yet due under the Note. In lieu of addressing these motions, the court commenced an evidentiary hearing, after which it made two rulings.

First, the court rejected the Trust's argument that Ferrantino's claim was not ripe since that issue was irrelevant to determining priority. Second, the court determined that Ferrantino's claims nevertheless amounted to an improper challenge of the arbitration award and therefore warranted dismissal. As the court explained in its Opinion and Order:

> The intervenors and the fund insist that the security interests granted by the fund predate the plaintiff's judgment and therefore have priority. If the plaintiff were a mere judgment creditor, that would undoubtedly be the case. However, the intervenors in this case are the same insiders to whom the plaintiff claimed had been improperly granted the security interests in the first place. In effect, the plaintiff claimed that the very existence of the security interests was the result of *ultra vires* acts. Whether this Court would agree with her on that interpretation issue is irrelevant because she presented those claims, as the parties had agreed, to arbitration and no objection was ever made to the arbitration award or its confirmation by this Court. By asserting the primacy of the purported security interests, the fund and the intervenors are now attempting to avoid the arbitration award which was based on the plaintiff's claims that those security interests were void as to her.

After the court denied Ferrantino's ensuing motion for reconsideration, the Trust moved for disbursement of the escrowed funds. Ferrantino then filed her claim of appeal on June 3, 2013, and requested a stay of the disbursement in the circuit court. The circuit court ultimately granted the Trust's motion, but delayed any disbursement for one month pending a contrary order from this Court. This Court denied Ferrantino's subsequent motion to stay,[3] and the escrowed funds were disbursed to the Trust on July 19, 2013.[4]

III. ANALYSIS

A. JURISDICTION

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[2] Zdanowski also intervened on identical grounds.

[3] *Becky L Glesner Trust v Three Oaks Property Fund, LLC*, unpublished order of the Court of Appeals, entered July 12, 2013 (Docket No. 316512).

[4] Although the circuit court also dismissed Zdanowski's claims, Zdanowski did not appeal.

Before reaching the merits of this appeal, we must first address the Trust's argument that this Court lacks jurisdiction because the time for taking an appeal as of right has passed. "Whether a party's claim of appeal is timely affects this Court's jurisdiction according to MCR 7.204(A) and is, therefore, reviewed de novo." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 132-133; 624 NW2d 197 (2000). The interpretation and application of a court rule is a question of law, which is likewise reviewed de novo. *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999).

The court rules plainly provide that a final judgment of a circuit court is appealable to this Court as of right. MCR 7.203(A). A final judgment is the first one that, among other things, "disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." MCR 7.202(6)(a)(*i*). Upon the circuit court's entry of a final judgment, a party has 21 days to file an appeal as of right. MCR 7.204(A)(1)(a). Hence, the failure to timely file an appeal within this time frame deprives this Court of jurisdiction to consider the appeal as of right. *Chen v Wayne State Univ*, 284 Mich App 172, 192-193; 771 NW2d 820 (2009).

The crux of the Trust's jurisdictional argument is that Ferrantino's intervention amounts to a collateral attack on the arbitration award, which the circuit court's December 5, 2012 "final judgment" confirmed. The Trust argues that this "final judgment" satisfied MCR 7.202(6)(a)(*i*) and, consequently, that Ferrantino's appeal of the April 26, 2013 opinion and order is in substance an untimely challenge to the "final judgment" in this case. The problem with this argument is twofold.

First, the substance of Ferrantino's challenge to the April 26, 2013 opinion and order pertains directly to her arguments on appeal. However, a party's arguments do not vest this Court with jurisdiction; the timely filing of a claim of appeal and provision of an entry fee does. MCR 7.204(B). Thus, whether Ferrantino's challenge amounts to a collateral attack on the arbitration award goes to the merits of her appeal and not this Court's jurisdiction in the first instance.

Second, the April 26, 2013 opinion and order is the first and final order adjudicating Ferrantino's claims, and therefore is, after her intervention, the first order that disposes of all claims of all the parties. The December 5, 2012 judgment is designated as "final," though it is not at all clear that this judgment "dispose[d] of all the claims and adjudicate[d] the rights and liabilities of all the parties," MCR 7.202(6)(a)(*i*), since that judgment merely confirmed an award regarding TOPF's liability to the Trust. Ferrantino's claim, on the other hand, focuses entirely on the priority of her alleged security interest.

The Trust argues that the December 2012 judgment is actually final because Ferrantino could not re-litigate what was already concluded in the arbitration award confirmed by the circuit court. But the issues resolved in arbitration did not encompass the effect the breach had on the validity of the security interest or the priority (if any) of Ferrantino's security interest. To that point, although the arbitration award clearly indicated that it was rendered "in full settlement of all claims submitted to this Arbitration," the Trust's arbitration claim impugning Ferrantino's

security interest focused exclusively on whether the grant of that interest breached the operating agreement and sought *only* money damages as a consequence.[5] Nothing was alleged regarding the *effect* of this breach and *no* request was made to have the security interest set aside as a consequence of this breach.

This is fatal to the Trust's reliance on collateral estoppel since that doctrine requires, among other things, that "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment . . . ." See *Monat v State Farm Ins Co*, 469 Mich 679, 682; 677 NW2d 843 (2004). As just noted, based on the amended statement of claim and the arbitration award, whether awarding the security interest was a breach of the agreement was decided by the arbitration, while whether the breach of the operating agreement rendered Ferrantino's security interest void *ab initio* was not litigated at arbitration.[6] And while the Trust cites *72-52 Investment Group, LLC v Lodish*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 287315), pp 2-3, 6, that case is inapposite since it pertained to whether contracts executed without requisite authority by an LLC's managers are unenforceable against a member who—unlike Ferrantino—*was otherwise not a party to the contract*.[7] Collateral estoppel therefore cannot prevent Ferrantino from bringing her claim now, but it does preclude her from arguing that awarding the security interest was not in breach of the agreement. Consequently, the April 26, 2013 opinion and order dismissing Ferrantino's claim of priority was the final order from which Ferrantino properly appealed. This Court has jurisdiction.

B. THE SECURITY INTEREST'S VALIDITY AND PRIORITY

This brings us to Ferrantino's argument that the circuit court erred in holding the arbitration resolved her claims. Although the parties disputed the issues of validity and priority of Ferrantino's security interest in their cross motions for summary disposition, the circuit court issued its ruling after conducting an evidentiary hearing. Accordingly, we review the circuit

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[5] Count II of the amended statement of claim alleging breach of the operating agreement expressly incorporates paragraph 15b, which in turn alleges that defendants violated the operating agreement in granting Ferrantino a security interest.

[6] The award did not contain any supporting findings, and "[t]here is no requirement that a verbatim record be made of private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required." *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 428; 331 NW2d 418 (1982). Accordingly, absent other documentation which the parties would agree constitutes the record or the contract of submission, it is appropriate for us to look to the face of the arbitration award alone to determine its basis. *Id*. at 429. In any event, Glesner testified the Trust did not seek to set aside Ferrantino's security interest at arbitration, but instead sought to provide a basis for recovery for the alleged fraudulent actions of TOPF's managers. This is fully consistent with the Trust's amended statement of claim, which, although alleging defendants improperly granted Ferrantino's security interest, did not specifically request that this interest be set aside.

[7] As an unpublished opinion, *Lodish* also lacks precedential value. MCR 7.215(C)(1).

court's conclusions of law, including the extent to which it interpreted the scope of the arbitration award, de novo, but we review its findings of fact for clear error. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

The purpose of Ferrantino's intervention was simple: to obtain a declaration that her security interest had priority over the Trust's judgment and, as a consequence, to obtain an escrow distribution of the proceeds from the sale of the Trust Building. The circuit court expressly declined to address this issue, however. Instead, after finding that Ferrantino was one of the "same insiders" accused of improperly receiving a security interest in arbitration, the court held that whether Ferrantino's security interest was void was already settled. Accordingly, the court concluded that having failed to challenge the arbitration award as confirmed, Ferrantino's lawsuit constituted an improper attempt to sidestep the award. This decision is in error.

As we have already noted, the only issue presented at arbitration pertaining to Ferrantino's security interest concerned whether TOPF's manager violated the operating agreement in granting that interest. The arbitration award settled this question in the affirmative. Nothing in the record establishes that the arbitration award rendered Ferrantino's security interest void as a consequence, and consequently the circuit court erred in failing to address this issue.

Although our holding necessitates reversal, Ferrantino argues at length that TOPF's manager did not breach the operating agreement, and that even if arbitration settled that issue, the decision does not bind her since she was not a party to arbitration. We see two problems. First, the plain language of the arbitration award and the amended statement of claim could not more squarely resolve the issue of breach based on the grant of the security interest. Second, as a member found to be an "insider," Ferrantino was clearly a privy with defendants at arbitration. See *Monat*, 469 Mich at 684 (holding that collateral estoppel requires, *inter alia*, the involvement of the same parties or privies). Indeed, Ferrantino was not only a member of TOPF at the time she obtained the security interest, but Glesner clearly testified about Ferrantino's friendship with the managers and her "more intimate knowledge about the Fund." See *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995) ("A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase") (citation omitted), aff'd sub nom *Husted v Dobbs*, 459 Mich 500 (1999); compare *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 116; 448 NW2d 722 (1989) (holding that the shareholder of a closed corporation is in privity with the corporation for the purposes of res judicata). Whether Ferrantino has an interest affected by the determination that she obtained her security interest (which she obtained in exchange for her pledge) in violation of the operating agreement is precisely what the circuit court must determine on remand.[8] She may not now seek to have this issue relitigated in an effort to establish priority.

[8] Despite the Trust's reliance on Glesner's testimony regarding Ferrantino's relationship with defendants, Ferrantino's claim that defendants had apparent authority to grant the security interest goes directly to the issue of validity, which the circuit court must resolve on remand.

Before concluding, we note that the circuit court properly rejected the Trust's alternative argument that Ferrantino could assert no claim because her interest was not ripe. Indeed, the Trust does not dispute that Ferrantino gave value, that TOPF had an interest in the Trust Building through its subsidiary, that the interest attached to the collateral, and that the proceeds from the sale of the Trust Building fell within the ambit of the security agreement and were perfected.[9] Thus, if Ferrantino's interest is valid, she certainly may argue its priority over the Trust's claim. See MCL 440.9201(1) (providing that security agreements are generally effective according to their terms against creditors); see also 4 White & Summers, Uniform Commercial Code (6th ed), § 31-1, p 111 (when a security agreement attaches, "[f]irst, if the debtor defaults, the secured creditor can foreclose or otherwise realize on the collateral to satisfy the claim. Second, the security interest becomes enforceable against third parties. In other words, the secured party, can in general, take the collateral from, or to the exclusion of, third parties."). The Trust is incorrect that this presents an alternative ground for affirmance.

Further, while there was no evidence showing that the events triggering Ferrantino's payment of her guaranty had occurred, this goes to whether Ferrantino may claim an escrow distribution of the proceeds rather than to whether she may assert priority in the first instance.[10] The circuit court, in ruling that the arbitration foreclosed Ferrantino's claims, necessarily did not reach the issue of whether Ferrantino was entitled to the proceeds. Indeed, Terraces's loan would not mature until December 2013. Nevertheless, evidence was presented that Terraces had missed at least one loan payment, although no default had been issued as of April 18, 2013. Therefore, if on remand the circuit court finds Ferrantino's security interest to be valid and superior to the Trust's interest, the court should address whether Ferrantino is entitled to a distribution of the sale proceeds if an event of default occurred.

IV. CONCLUSION

We reverse the circuit court's April 26, 2013 opinion and order and remand for proceedings consistent with this opinion, including resolution of the issues of the validity and, if valid, the priority of Ferrantino's security interest as raised by the parties in their cross motions for summary disposition. Depending on the resolution of these issues, the circuit court may then determine whether Ferrantino is entitled to a distribution of the sale proceeds if there was an event of default.

See *VanStelle v Macaskill*, 255 Mich App 1, 9; 662 NW2d 41 (2003) (the doctrine of apparent authority requires that reliance on the purported authority be reasonable) (citation omitted).

[9] Under the Uniform Commercial Code, MCL 440.1101 *et seq.*, security agreements generally attach to collateral and identifiable proceeds of collateral when they become enforceable, MCL 440.9203, 440.9315(1)(b); and they become enforceable upon their execution when, *inter alia*, value is given and when the debtor has certain rights in the collateral, MCL 440.9203. A security interest in collateral proceeds is perfected "if the security interest in the original collateral was perfected." MCL 440.9315(3).

[10] Section 4 of the security agreement expressly permits Ferrantino to exercise her rights under the agreement if any of several specific events of default occur.

We do not retain jurisdiction.

Neither party may tax costs. MCR 7.219(A).

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray